Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of	)	
	)	
Amendment to the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	)	IB Docket No. 96-111
	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23
	)	RM-7931
	)	
Communications Satellite Corporation	)	File No. ISP-92-007
	)	
Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the Intelsat K Satellite	)	

REPLY COMMENTS OF PANAMSAT CORPORATION

Henry Goldberg
Joseph A. Godles
Mary J. Dent

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 429-4900

March 4, 1998

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of	)	
	)	
Amendment to the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	)	IB Docket No. 96-111
	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23
	)	RM-7931
	)	
Communications Satellite Corporation	)	File No. ISP-92-007
	)	
Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the Intelsat K Satellite	)	

REPLY COMMENTS OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby responds to the Opposition of Comsat Corporation ("Comsat") to Petitions for Reconsideration, filed on February 17, 1998 (the "Opposition"). Comsat's Opposition was submitted in response to a Petition for Reconsideration of the Report and Order in the above-captioned proceeding released on November 26, 1997 (the "DISCO II Report and Order") filed by PanAmSat (the "Petition"), as well as to Petitions for Reconsideration of the DISCO II Report and Order filed by GE American Communications, Inc. ("GE") and IDB Mobile Communications, Inc. ("IDB") (the "GE Petition" and the "IDB Petition," respectively).

BACKGROUND AND SUMMARY

In its Petition, PanAmSat sought reconsideration of three aspects of the Commission's DISCO II Report and Order.

First, PanAmSat sought reconsideration of the Commission's abrupt decision to allow Comsat to provide U.S. domestic service subject to (i) an "appropriate" (but as yet still undefined) waiver of immunity, and (ii) a demonstration that Comsat's entry will promote competition in the U.S. market and otherwise is in the public interest (the "competition showing"). Second, PanAmSat sought reconsideration of the Commission's decision not to require licensing of receive-only earth stations used to access Intelsat K transmissions and Intelnet I services. Finally, PanAmSat urged the Commission to take appropriate steps to ensure that its competitive review of an IGO affiliate's entry applications is independent of any Executive Branch determination with respect to such affiliate.

Comsat's Opposition ignores completely several of PanAmSat's arguments and requests, essentially conceding the points made by PanAmSat. Where Comsat does attempt to address PanAmSat's concerns, it misstates both fact and law in an unpersuasive effort to overcome the demonstrated need for additional safeguards and regulatory requirements. Accordingly, the Commission should grant PanAmSat's Petition.

DISCUSSION

I. THE COMMISSION'S DECISION TO ALLOW COMSAT TO PROVIDE U.S. DOMESTIC SERVICE ABSENT MORE RIGOROUS COMPETITIVE SAFEGUARDS IS FLAWED AS A MATTER OF LAW AND POLICY.

A. Comsat Did Not Even Address, Much Less Rebut, PanAmSat's Showing That The DISCO II Decision Does Not Satisfy The APA's Requirements Or The Commission's Own Standards.

As PanAmSat demonstrated in its Petition, the Commission's decision to allow Comsat to provide U.S. domestic service subject to an "appropriate" waiver of immunity from suit and a still-vague "competition showing" did not meet the requirements of the Administrative Procedure Act ("APA") or the Commission's own high standards for administrative rulemaking.[1]

The DISCO II Notice of Proposed Rulemaking ("DISCO II NPRM") and the DISCO II Further Notice of Proposed Rulemaking ("DISCO II FNPRM") discussed in general terms how the Commission's proposed satellite entry standards should apply

---

[1] See PanAmSat Petition at 3-5.

to intergovernmental organizations ("IGOs"), such as Intelsat and Inmarsat, and to affiliates of the IGOs, such as INC and ICO. Neither, however, raised with adequate specificity the question of whether, and under what conditions, the Commission should permit Comsat to resell the IGOs' services in the U.S. domestic market. In particular, neither the DISCO II NPRM or the DISCO II FNPRM proposed to adopt, or requested comment on, anything resembling the immunities waiver/competition showing standard that the Commission ultimately adopted in the DISCO II Report and Order.

Comsat's entry into the U.S. domestic services market will have far-reaching effects on competition in both the domestic and international satellite communications markets. Both as a matter of APA law and FCC practice, interested parties should have been given clear notice of the Commission's intentions and a concrete proposal upon which to comment. They were not.

Comsat's Opposition completely ignores this portion of PanAmSat's Petition. Comsat never claims — and, indeed, it could not — that the DISCO II NPRM or the DISCO II FNPRM specifically proposed to permit Comsat to enter the U.S. market using the test adopted in the DISCO II Report and Order. Notably, Comsat also does not even argue that the Commission's decision — including its specific entry test for Comsat — is a logical outgrowth of any proposal in the DISCO II NPRM or FNPRM.

The closest Comsat comes to addressing PanAmSat's APA argument is its discussion of GE's contention that the Commission acted prematurely in granting Comsat access to the U.S. domestic market.[2] In this discussion, Comsat asserts that the Commission raised the general issue of IGO (and, consequently, Comsat) entry into the U.S. market in this proceeding.[3] PanAmSat, however, never claimed otherwise. Rather, the problem is that the Commission did not propose and seek comment on a set of terms and conditions under which such entry would be allowed to occur, with the specificity required by the APA and Commission practice. Nothing in Comsat's Opposition addresses — much less rebuts — this contention.

---

2 Comsat Opposition at 5-8.

3 Comsat Opposition at 7.

B. Comsat's Opposition Misstates Both Fact And Law In An Unpersuasive Effort To Overcome PanAmSat's Demonstration That The DISCO II Entry Test Is Flawed As A Matter Of Policy.

The procedural requirements for conducting a rulemaking are intended to assure open, vigorous, and focused debate. Without that assurance, there is a risk that agencies will adopt rules that are not in the public interest. Such an outcome occurred in this case. The Commission's decision to allow Intelsat and Inmarsat, through Comsat, to enter the U.S. domestic services market subject to an "appropriate" — but as yet undefined — waiver of Comsat's immunity and a still-vague competition showing threatens to undermine and distort competition in the U.S. domestic and international services markets. There are two problems with the decision.

First, one cannot know to what extent the Commission will use its competition inquiry to remedy the existing (and well-documented) competitive imbalances relating to IGO services. Certainly, nothing in DISCO II mandates that it do so. Second, the Commission's entry rules deal with Comsat's derivative immunity but do not address the IGOs' direct immunity. As a result, they overcome only in part the competitive harms that will occur if an entity protected by immunity is allowed to enter the U.S. market.

1. Comsat and the IGOs enjoy unique competitive advantages.

PanAmSat's Petition documented that the IGOs benefit from a host of unique attributes that give them an unfair competitive advantage. As a result, it urged the Commission either to exclude IGO satellites from the U.S. domestic market entirely or to impose additional safeguards on IGO entry.[4]

Comsat's Opposition attempts to challenge the factual predicate to PanAmSat's request: *i.e.*, that the IGOs (and through them, Comsat) have a unique ability to distort competition. In doing so, however, Comsat turns its back on the Commission's own findings in this proceeding and ignores the advantages it would have in the U.S. market as a bottleneck supplier of Intelsat and Inmarsat services.[5]

---

4 PanAmSat Petition at 5-10. .

5 Comsat Opposition at 4, 8-13.

The Commission has found in this proceeding that the IGOs (and through them, Comsat) enjoy privileges, immunities, market access rights, and relationships with foreign carriers that give them advantages over their competitors and the ability to act anti-competitively. The Executive Branch has reached a similar conclusion.[6] As the Commission stated in the DISCO II Report and Order:

> These organizations [the IGOs] have certain privileges and immunities that provide them competitive advantages over competing satellite providers. For example, they are immune to suits in court (with limited exceptions for commercial contracts), including jurisdictional, discovery and asset immunity from antitrust laws. They also enjoy tax-free status. For example, they are exempt from income, corporate and property taxes, and customs and other duties in the host countries and other member states. Their size and the fact that their members are the primary, if not exclusive, providers of fixed and mobile maritime services in most major markets gives them a special, and possibly dominant, position in the global market. Further, COMSAT, by virtue of the Communications Satellite Act of 1962 and the 1978 International Maritime Satellite Telecommunications Act, is the U.S. signatory to the IGOs. COMSAT provides INTELSAT and Inmarsat space segment capacity to users in the United States. COMSAT pays taxes, but as we discuss below, indirectly benefits from IGO immunity from suit, including suit based on U.S. antitrust laws.[7]

Comsat fails completely to rebut the Commission's express conclusions regarding the competitive risks posed by the IGOs. These conclusions, reached by the Commission on the basis of the record in this proceeding, define the factual context within which the IGO/Comsat entry standard must be judged.

Comsat attempts to downplay the significance of its advantages along "thin routes" — routes where it is PanAmSat's position that Comsat has market power over public switched network ("PSN") services — by asserting that PanAmSat provides

---

[6] See, e.g., U.S. Written Statement on K-TV Procurement for the Intelsat Board of Governors Meeting (December 6, 1996)(stating unequivocally that "IGOs should stay out of competitive markets," and expressing a "strong preference for letting the private market provide goods and services wherever possible").

[7] DISCO II Report and Order at ¶ 102 (citations omitted); see also id. at ¶ 118 ("we share the concerns expressed by many commenters about the special advantages accorded IGOs as a result of their treaty-based status"); id. at ¶ 125 ("We agree ... that IGOs have unique characteristics as treaty-based organizations that could enable them to distort competition."); DISCO II NPRM at ¶¶ 62, 64, 71, 73.

service to all but 15 of the countries that Comsat classifies as thin route.[8] Comsat's argument, however, does not withstand scrutiny because it fails to address the nature of PanAmSat's services in these countries. In fact, PanAmSat provides virtually no PSN services in any region.

As reflected in PanAmSat's February 6, 1998, filing in the Comsat non-dominance proceeding,[9] PanAmSat provides limited PSN services to only 4.1% of the world's countries. The picture is even more revealing when one looks at the nature of the services and the regions in which they are provided. In Western and Eastern Europe and the Middle East, PanAmSat provides no international PSN service. In South and Central America, PanAmSat provides PSN service in only six out of 36 countries, but all of this service is receive-only and not full receive-transmit service. In the Far East, Pacific Rim, and Central and South Asia regions, PanAmSat provides PSN service in only one out of 25 countries and, here too, it is limited to receive-only service. In Africa, PanAmSat provides receive-only PSN service in only one out of 52 countries.[10]

In short, Comsat has special advantages over competing satellite systems, the Commission has so found, and Comsat's protestations to the contrary are unavailing.

2. In order to address the threat to competition posed by the IGOs and Comsat, the Commission should continue to exclude them from the U.S. domestic market or, at a minimum, should impose additional safeguards.

As noted above, Comsat's Opposition attempts to gloss over — but does nothing to rebut — the IGOs' recognized ability to distort competition. Moreover, it does not even attempt to demonstrate that the DISCO II entry standards are adequate to address the risks posed by these entities' entry into the U.S. domestic market. As a result, the Commission should grant PanAmSat's Petition and decline to permit the IGOs, through Comsat, to enter the U.S. domestic market. If the Commission is unwilling to reverse its IGO entry decision altogether, it should impose additional

---

8 Comsat Opposition at 12-13.

9 File No. 60-SAT-ISP-97.

10 Moreover, PanAmSat's Supplemental Comments in the Comsat Non-Dominance Proceeding, File No. 60-SAT-ISP-97 (filed Feb. 24, 1998) and the studies attached to them, provide extensive evidence of Comsat's market power.

safeguards that more adequately address the competitive harms threatened by IGO entry into the U.S. domestic market.[11]

In its Petition, PanAmSat demonstrated that a waiver of Comsat's derivative immunity will do nothing to remedy the anti-competitive advantages conferred upon Comsat by the IGOs' direct immunity.[12] As a result, PanAmSat urged the Commission to require, as a condition of Intelsat or Inmarsat entry, not only a waiver of Comsat's derivative immunity but also a waiver by the IGO involved of its direct immunity from suit in the United States.

Comsat's sole response to this recommendation is that the Commission is powerless, both legally and practically, to impose such a condition.[13] Notably, Comsat does not contend that it does not benefit from the IGOs' direct immunity or argue that requiring such a waiver does not logically flow from the Commission's conclusion, in the DISCO II Report and Order, that the IGOs' immunity to suits in court, including jurisdictional, discovery and asset immunity from antitrust laws, constitutes one of the primary "privileges and immunities" that give these entities competitive advantages over competing satellite providers.[14]

The Commission, however, has the legal authority to define the conditions under which an entity will be permitted to enter the U.S. market. If it determines that IGO entry into the U.S. domestic market will be anti-competitive if the IGOs retain their immunity from suit, it has the authority to condition entry on a waiver of that immunity. Such an action would not be an improper attempt to exercise control over the IGO but, rather, a proper exercise of the Commission's responsibility to regulate entry into the U.S. market in the public interest. Similarly, as a practical matter, the Commission has the ability to implement such a condition by stating that it will revoke any existing authorization involving the IGO if the IGO (or an affiliate or representative of the IGO) seeks to invoke immunity as a defense in a U.S. lawsuit.

---

11 PanAmSat Petition at 6-10.

12 PanAmSat Petition at 7.

13 Comsat Opposition at n.19.

14 See DISCO II Report and Order at ¶ 102.

PanAmSat notes that the need for an IGO waiver of immunity will become even more important if the Commission permits direct access to Intelsat.[15] Under direct access, many of the retailing functions and pricing decisions now being performed by Comsat in the United States would revert to Intelsat. That would place the Commission in an intolerable position, given Intelsat's immunities and the Commission's history of not "piercing the corporate veil" when regulating Comsat. As Comsat's own expert has recognized, allowing Intelsat to serve U.S. end users "would sever U.S. regulatory oversight over retailing and pricing of Intelsat services in the U.S. "[16] As a result, absent a direct waiver of immunity, Intelsat would be free to act in any manner it desired, unchecked by the constraining forces of the FCC or U.S. antitrust and other laws.

In addition to the issue of immunity, there is a substantial risk that the IGOs will engage in cross-subsidization. In particular, there is a risk that Intelsat/Comsat will use revenues from the two markets in which they recently have been found to possess market power (occasional video and switched-voice and private-line services on "thin routes") to subsidize rates in competitive markets.[17] In light of this fact, PanAmSat urged the Commission to require IGO compliance with strict accounting safeguards to protect against cross-subsidization.[18]

Comsat attempts, unpersuasively, to claim that it lacks market power or the ability to manipulate rates.[19] This claim ignores findings by the Commission and the International Bureau in the Comsat Partial Relief and Streamlined Video proceedings that Comsat has market power for switched voice and private line services along thin routes, and for occasional and short-term video services along all routes.[20] Moreover,

---

15 The question of "direct access" is being considered in connection with Comsat's request to be freed from dominant carrier regulation.

16 See M. Schwartz, "The Benefits and Costs of Direct Access to Intelsat in the U.S." (Feb. 1998).

17 PanAmSat Petition at 8-9.

18 PanAmSat Petition at 8-9. As is true with the immunity issue, the issue of cross-subsidies will become even more pronounced if the Commission permits U.S. users directly to access Intelsat satellites.

19 Comsat Opposition at 10-11.

20 See Comsat Corporation Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services, File No. 14-SAT-ISP-97 (rel. Aug. 14, 1997) ¶¶ 38 *et seq.*; Comsat Corporation Petition for Partial Relief from

it ignores the Commission's recognition in the DISCO II Report and Order that there is a risk of cross-subsidization and, hence, a need for the Commission's IGO entry standard and regulations to prevent this form of anti-competitive conduct.[21] Finally, it ignores the statements of users of occasional video services that there is a shortage of capacity and, hence, that these users are unusually reliant on Intelsat/Comsat for service.[22]

Accordingly, in the event that IGOs are not excluded from the U.S. domestic market altogether, the Commission should impose on the IGOs an appropriate set of accounting safeguards designed to prevent cross-subsidization. Only by taking such a step will it protect U.S. end users and have a consistent policy for satellites not covered by the WTO Agreement.[23]

Finally, PanAmSat noted in its Petition that Intelsat enjoys automatic access to virtually every market in the world, often on preferential terms, due to the dominant or monopoly position of most of its Signatories and its market power in the occasional video and thin route telephony markets.[24] In addition, PanAmSat discussed the global nature of communications markets and users' growing desire to obtain a combination of domestic and international services.[25] In order to prevent Comsat from capitalizing on these advantages in an anti-competitive manner, PanAmSat urged the Commission to impose unbundling requirements upon Comsat to prevent it from leveraging Intelsat's privileged market access overseas and dominance on thin routes to gain a competitive advantage in the U.S. domestic market.

In response, Comsat claims that competition will prevent it from engaging in anti-competitive bundling.[26] Comsat's argument, however, ignores the basis for Comsat's unparalleled access worldwide. Comsat has access to most markets by

---

the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private-Line, and Video and Audio Services, RM-7913 (rel. Aug. 15, 1996) ¶¶ 25-26.

21 DISCO II Report and Order at ¶ 123.

22 See DISCO II Report and Order at ¶ 114.

23 See PanAmSat Petition at 9 (while the ECO-Sat analysis will prevent cross-subsidization by satellite systems serving markets that are not open to competition, the IGO entry standard contains no comparable safeguard).

24 PanAmSat Petition at 9-10.

25 Id.

26 Comsat Opposition at 12-13 and n.29.

virtue of its status as an Intelsat Signatory. The other Intelsat members are "the primary, if not exclusive, providers of fixed and mobile maritime services in most major markets."[27] Comsat's fellow IGO owners have every incentive to deprive separate systems of the market access that would enable them to compete with Intelsat.[28] The extraordinary advantages that Comsat enjoys in access to overseas markets helps account for the fact that separate systems provide virtually no switched telephony, and have been severely handicapped in their occasional video service efforts.

For these reasons, the Commission should reaffirm its conclusion that the IGOs and, through them, Comsat, enjoy unique and potentially anti-competitive advantages, and as a result either should reverse its decision to permit these entities to enter the U.S. domestic market or, at a minimum, should impose on them the additional safeguards described in PanAmSat's Petition.

II. COMSAT DID NOT OPPOSE PANAMSAT'S RECOMMENDATION THAT THE COMMISSION SUBJECT INTELSAT K AND INTELNET I TERMINALS TO LICENSING.

In its Petition, PanAmSat urged the Commission to reconsider its decision not to require receive-only earth stations operating with the Intelsat K satellite or receiving Intelnet I services from Intelsat satellites to be licensed by the FCC. In DISCO II, the Commission decided generally to use its earth station application process to ensure compliance with its rules and policies, obviating the need for non-U.S. satellites to obtain a U.S. space station license when providing U.S. service. In addition, it decided not to subject IGOs to an ECO-Sat analysis or otherwise assert direct jurisdiction over IGO operations in the U.S.

Despite these decisions, however, the Commission did not reverse its current policy of permitting Intelsat K and Intelnet I service earth stations to operate without an individual license. As a result, the Commission deprived itself of its only remaining opportunity to ensure that Intelsat's provision of Intelsat K and Intelnet I services complies with its technical rules and competitive policies.

---

[27] DISCO II Report and Order at ¶ 102.

[28] See study prepared by Drs. Bruce Owen and Henry McFarland of Economists Inc., filed by PanAmSat on February 24, 1998 in the Comsat non-dominance proceeding (File No. 60-SAT-ISP-97).

Comsat's Opposition is silent on this issue. In light of this silence and the fact that the Commission's treatment of Intelsat K and Intelnet I services is inconsistent with the policy determinations that were made in DISCO II, the Commission should grant PanAmSat's request and require that receive-only earth stations operating with the Intelsat K satellite or receiving Intelnet I services from Intelsat satellites be licensed by the FCC.

III. THE COMMISSION SHOULD SCRUTINIZE CLOSELY IGO AFFILIATE APPLICATIONS TO ENTER THE U.S. MARKET.

The final issue raised in PanAmSat's Petition was the potential conflict between the Commission's involvement in developing the Executive Branch's position on the creation and structure of an Intelsat affiliate and its responsibility to review that policy independently as part of its "competitive review" of a subsequent request by an IGO affiliate to enter the U.S. market.[29] PanAmSat urged the Commission to take whatever steps are necessary to preserve the independence of its "competitive review" of future IGO affiliate applications.

In response to this request, Comsat took the extraordinary position that the Commission may not scrutinize closely the competitive and other public interest concerns implicated by an IGO affiliate's application to serve the U.S. market.[30] In Comsat's view, scrutiny would be inconsistent with the United States' obligations under the WTO Basic Telecom Agreement.

Comsat's position is completely groundless. Title III of the Communications Act requires the Commission to examine all radio applications to determine whether a grant of authority is consistent with the public interest, convenience and necessity. Consistent with this requirement, the DISCO II framework expressly recognizes that *all* applications — including those involving satellites licensed by WTO member countries — may be scrutinized more closely, and special conditions may be imposed,

---

29 PanAmSat Petition at 11-12.

30 Comsat Opposition at 13-14. As Comsat appears to recognize, the United States owes no market access, national treatment, or MFN obligations to the IGOs themselves because they are intergovernmental treaty organizations rather than service suppliers of WTO Members. E.g., DISCO II Report and Order at ¶¶ 110, 119.

if there is evidence that a grant may harm competition in the U.S. satellite services market.[31]

As the Commission recognized in DISCO II, entry by IGO affiliates raises unique competition issues.[32] Accordingly, while the same general set of legal rules will govern entry by IGO affiliates and by similar systems licensed by WTO members, the factual analysis of an IGO affiliate's application necessarily will consider the potential anti-competitive or market distorting consequences of a continued relationship or connection between and IGO and its affiliate.[33]

This approach is fully consistent with — and, indeed, mandated by — the WTO Basic Telecom Agreement and its MFN commitments. The Executive Branch expressly recognized at the time it negotiated the WTO Basic Telecom Agreement that entry by IGO affiliates raise unique competitive concerns and, therefore, merit special scrutiny. In particular, the U.S. Trade Representative specifically has stated, in the attached letter, that the United States has no obligation to permit market access to a future privatized affiliate, subsidiary, or other IGO spin-off that would lead to anti-competitive results.[34]

Similarly, the WTO's MFN commitments do not require a national regulatory body to treat service providers from all other WTO members identically. Rather, they require that a national regulatory body treat all such entities fairly and in a manner that does not modify the conditions of competition in favor of certain foreign or domestic suppliers.[35] The MFN commitments, therefore, can be met only if the

---

31 DISCO II Report and Order at ¶¶ 7, 41; see also id. at ¶ 46 (rejecting the European Commission's position that the Commission may not review or deny applications in order to protect competition in the U.S. market).

32 E.g., DISCO II Report and Order at ¶ 14, 129, 131; DISCO II FNPRM at ¶¶ 34-36.

33 DISCO II Report and Order at ¶¶ 14, 136.

34 See Letter from Charlene Barshefsky, U.S. Trade Representative Designate, to Ken Gross, President and Chief Operating Officer, Columbia Communications (Feb. 12, 1997).

35 DISCO II Report and Order at ¶ 22; see also id. at ¶ 47 (compliance with the MFN commitments must be analyzed on a case-by-case basis by considering whether the service or service suppliers are like and then analyzing the structure and application of the contested measures, and a regulatory body may treat carriers with the ability to distort competition differently from carriers that lack the ability to distort competition).

Commission takes into consideration as part of its "competition analysis" of an IGO affiliate's proposed entry the unique factual circumstances that make such entry potentially anti-competitive.[36] Were it to do any less, the Commission would be affording special treatment to the IGO affiliate, in violation of the WTO Agreement and the MFN commitments.

CONCLUSION

For the reasons set forth above and in PanAmSat's Petition, the Commission should reverse or modify its decision to allow Intelsat, through Comsat, to provide U.S. domestic services; reverse its decision to exempt from licensing receive-only earth stations operating with the Intelsat K satellite or receiving Intelnet I services; reiterate

---

36 On this point, PanAmSat notes that the proposal for structuring INC recently endorsed by Intelsat's "working party" fails to meet virtually every one of the DISCO II criteria for determining whether an application to serve the U.S. market by an IGO affiliate raises the potential for competitive harm. For example, the affiliate will be owned 100 percent by Intelsat and its Signatories, five out of seven board members will be representatives of Signatories, there are no special structural protections against collusion or cross-subsidization and, in fact, the organizations will remain intertwined because Intelsat will continue to provide services (including TT&C, billing, procurement, and other administrative or operational functions) during a "transitional period." Intelsat, moreover, will have "insured capacity rights" enabling it to request up to 24 transponders on INC satellites to fulfill its basic telecom commitments.

that it will apply special criteria to applications by an IGO spin-off to serve the U.S. market; and take whatever measures are necessary to preserve its independent review of IGO-affiliate applications to access the U.S. market.

Respectfully submitted,

PANAMSAT CORPORATION

By: /s/ Henry Goldberg
Henry Goldberg
Joseph A. Godles
Mary J. Dent

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 429-4900

Its Attorneys

March 4, 1998

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON D C 20508

[illegible] 2 1997

Mr. Kenneth Gross
President and Chief Operating Officer
Columbia Communications
7200 Wisconsin Avenue, N.W.
Suite 701
Bethesda, Maryland 20814

Dear Mr. Gross:

I am writing in reply to a letter of January 31, 1997, from your legal counsel, regarding the negotiations on basic telecommunications services at the World Trade Organization. The U.S. goal in these negotiations is to strengthen the ability of the U.S. satellite services industry to compete globally, and on a level playing field, with the inter-governmental satellite services organizations and with satellite service providers of other countries.

The United States has taken a number of steps to make certain that our key trade partners provide market access for satellite-based delivery of basic telecom services. Based on a note issued by the chairman of the negotiations in November, 1996, which has become part of the formal record of the proceedings, we have clarified the scheduling approach with regard to satellites. As a result, close to forty countries have made offers that would provide full market access for satellite-based delivery of all scheduled services, on an immediate or phased-in basis.

WTO members that make specific commitments on satellites will be subject to allocating and assigning frequencies in accordance with the principles of most-favored-nation and national treatment, as well as in accordance with the requirement for domestic regulations in the General Agreement on Trade in Services. Almost all of the countries making full satellite commitments have also adopted the reference paper on pro-competitive regulatory commitments. As a result, they will be obligated to provide additional regulatory safeguards with respect to allocation and use of radio frequencies.

A successful agreement on basic telecom services would also obligate those countries which have not made satellite commitments to provide treatment no less favorable to satellite service providers of the United States than the treatment provided to service suppliers of other countries. This would apply, for example, to how WTO members reach decisions regarding new market access arrangements involving service suppliers of other countries.

I share your deep concern regarding the possible distortive impact on competition in the U.S. satellite services market of certain proposals for restructuring INTELSAT. The United States has proposed a restructuring of INTELSAT that would lead to the creation of an independent commercial affiliate, INTELSAT New Corporation (INC). If made independent, the United

States believes that the creation of INC will enhance competition and help ensure the continuation of INTELSAT's mission of global connectivity for core services. As you are aware, however, many INTELSAT members are resisting the idea of independence for INC and we believe that a failure to achieve independence could adversely affect competition in the U.S. satellite services market. In the WTO negotiations we have taken pains to preserve our ability to protect competition in the U.S. market.

Our legal conclusion, for which there is a consensus among participants in the WTO negotiations, is that the ISOs do not derive any benefits from a GBT agreement because of their status as treaty-based organizations. The status of ISOs was discussed in detail in the GBT multilateral sessions. No delegation in the GBT negotiations has contested this conclusion.

We have also concluded that the United States cannot be forced to grant a license to a privatized ISO (should the ISO change its treaty status and incorporate in a country) or to a future privatized affiliate, subsidiary or other form of spin-off from the ISO. Existing U.S. communications and antitrust law, regulation, policy and practice will continue to apply to license applicants if a GBT deal goes into effect. Both Department of Justice and FCC precedent evidence long-standing concerns about competition in the U.S. market and actions to protect that competition. We have made it clear to all our negotiating partners in the WTO that the United States will not grant market access to a future privatized affiliate, subsidiary or other form of spin-off from the ISOs, that would likely lead to anti-competitive results.

It has always been U.S. practice to defend vigorously any challenge in the WTO to allegations that U.S. measures are inconsistent with our WTO obligations. There is no question that we would do the same for any FCC decision to deny or condition a license to access an ISO or a future privatized affiliate, subsidiary or other form of spin-off from the ISO. For your information, Section 102(c) of the Uruguay Round Agreements Act, specifically denies a private right of action in U.S. courts on the basis of a WTO agreement. Therefore, a FCC decision is not subject to judicial review in U.S. courts based upon a WTO agreement, such as the General Agreement on Trade in Services.

The United States is confident that it would win if a U.S. decision went to WTO dispute settlement. If the United States did not prevail, however, we would not allow trade retaliation measures to deter us from protecting the integrity of U.S. competition policy.

I appreciate the support your firms' representatives have expressed for our objectives in the WTO negotiations.

Sincerely,

Charlene Barshefsky
United States Trade Representative-Designate

cc: Chairman Reed Hundt, Federal Communications Commission

FCC Secretary William F. Caton for inclusion in the rulemaking proceeding concerning the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States (FCC 96-210, released May 14, 1996)

Daniel S. Goldberg, Counsel to PanAmSat

Raul R. Rodriguez, Counsel to Columbia Communications Corporation

April McClain-Delaney, Counsel to Orion Network Systems, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Comments of PanAmSat Corporation was sent by first-class mail, postage prepaid, this 4th day of March, 1998, to each of the following:

* The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

* Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

* Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

* Commissioner Michael K. Powell
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20544

* Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

* Donald Gips
Chief Domestic Policy Advisor to the
Vice President
Old Executive Office Building
17th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20500

* Regina M. Keeney
Federal Communications Commission
2000 M Street, N.W.
Room 800
8th Floor, Mail Stop 0800
Washington, D.C. 20554

* Tom Tycz
Chief, Satellite Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
8th Floor, Mail Stop 0800B
Washington, D.C. 20554

* Fern Jarmulnek
Chief, Policy Branch Satellite Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 518
Mail Stop 0800B
Washington, D.C. 20554

* Cecily C. Holiday, Esq.
Deputy Chief, Satellite &
Radio Telecommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 824
Washington, D.C. 20554

* Karl Kensinger
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 514
Washington, D.C. 20554

* Jim Ball
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 820
Washington, D.C. 20554

* Virginia Marshall
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 515
Washington, D.C. 20554

* Ambassador Vonya B. McCann
U.S. Coordinator & Deputy Assistant Secretary
U.S. Department of State
2201 C Street, N.W., Room 4826
Washington, D.C. 20520

* Steve Lett
U.S. Department of State
Room 4826
2201 C Street, N.W.
Washington, D.C. 20520

* Elizabeth Kiingi, Esq.
L/PM
U.S. Department of State
2201 C Street, N.W.
Room 6429
Washington, D.C. 20520

Kevin M. Joseph
Senate Subcommittee on Communications
558 Senate Dirksen Office Building
Washington, D.C. 20510

* Joan Donoghue
L/EBC
U.S. Department of State
Room 6420
2201 C Street, N.W.
Washington, D.C. 20520

The Honorable Clarence L. Irving, Jr.
Assistant Secretary for Communications
and Information
NTIA/OIA
U.S. Department of Commerce
14th & Constitution Avenue, N.W.
Room 4898
Washington, D.C. 20230

Jack A. Gleason
Division Director
NTIA/OIA
U.S. Department of Commerce
14th & Constitution, N.W.
Room 4701
Washington, D.C. 20230

Nancy Eskenazi
Telecommunications Policy Specialist
NTIA/OIA
U.S. Department of Commerce
14th & Constitution Avenue, N.W.
Room 4701
Washington, D.C. 20230

Monica Azare
Office of the Honorable W.J. Tauzin
U.S. House of Representatives
2183 Rayburn House Office Building
Washington, D.C. 20515

Andy Levin
Committee on Commerce
564 Ford House Office Building
Washington, D.C. 20515

Colin Crowell
Legal Assistant
Office of the Hon. Edward J. Markey
2133 Rayburn House Office Building
Washington, D.C. 20515

Dorothy Robyn
Special Assistant to the President
Old Executive Office Building
17th Street & Pennsylvania Avenue, N.W.
Room 233
Washington, D.C. 20500

Ed Hearst
Committee on Comerce
316 Ford House Office Building
Washington, D.C. 20515

Patricia Paoletta
Committee on Commerce
316 Ford House Office Building
Washington, D.C. 20515

Janice M. O'Connell
Committee on Foreign Relations
439 Senate Dirksen Office Building
Washington, D.C. 20510

Paula Ford
Senate Subcommittee on Communications
558 Dirksen Senate Office Building
Washington, D.C. 20510

Bob Foster
Office of the Honorable Michael Oxley
2233 Rayburn House Office Building
Washington, D.C. 20515

Kalpak Gude
Senate Commerce Subcommittee
227 Hart Senate Office Building
Washington, D.C. 20510

Mark Buse
Senate Commerce Committee
508 Dirksen Senate Office Building
Washington, D.C. 20510

Bill Bates
Office of the Honorable Anna G. Eshoo
308 Cannon House Office Building
Washington, D.C. 20515

Mark Ashby
Office of the Hon. John B. Breaux
516 Hart Senate Office Building
Washington, D.C. 20510

Drew Fields
Office of the Honorable John D. Rockefeller, IV
531 Hart Senate Office Building
Washington, D.C. 20510

Greg Rohde
Office of the Honorable Byron L. Dorgan
713 Hart Senate Office Building
Washington, D.C. 20510

Carol Grunberg
Office of the Honorable Ron Wyden
717 Hart Senate Office Building
Washington, D.C. 20510

Howard Waltzman
Office of the Honorable Sam Brownback
303 Hart Senate Office Building
Washington, D.C. 20510

Carl Biersack
Office of the Honorable Trent Lott
487 Russell Senate Office Building
Washington, D.C. 20510

Gregg Rothschild
Office of the Honorable John F. Kerry
421 Russell Senate Office Building
Washington, D.C. 20515

Beth Hall
Office of the Honorable Joe Barton
2264 Rayburn House Office Building
Washington, D.C. 20515